GLARET SHIRLEY SINNAPAN v. SIVASANKAR KUNCHIRAMAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN J
[DIVORCE PETITION NO: WA-33-293-05-2018]
31 OCTOBER 2022

Abstract – *(i) Circumstantial evidence is sufficient to prove adultery since it is impossible to obtain direct evidence of adultery. If, from evidence, there is disposition between the spouse and a third party to have committed adultery and there was opportunity for them to commit it, and the adultery is proven on a balance of probabilities, it can then be established that the spouse had committed adultery with the third party and that their adultery had caused and/or led to the breakdown of the marriage. The third party must therefore take the share of responsibility for the breakdown of the marriage and ought to pay damages to the petitioner spouse; (ii) monies in EPF forms part of matrimonial assets and pursuant to s. 53A of the Employees Provident Fund Act 1991, the EPF Board after receiving the sealed order of the court is empowered to transfer the sums ordered by court from the husband to the wife. Equality of distribution of matrimonial assets between a husband-and-wife ought to be ordered, including any properties that were purchased during marriage.*

FAMILY LAW: *Divorce – Petition – Breakdown of marriage – Adultery – Standard of proof – Whether on balance of probabilities – Whether circumstantial evidence could be relied on to prove adultery – Whether petitioner wife proved respondent husband committed adultery with third party – Whether led to breakdown of marriage – Whether marriage ought to be dissolved – Whether decree nisi made absolute*

FAMILY LAW: *Divorce – Maintenance – Wife and children – Means and needs of parties – Matrimonial assets – Degree of responsibility to parties for breakdown of marriage – Whether wife and children entitled to maintenance*

FAMILY LAW: *Divorce – Adultery – Third party – Petitioner wife sued third party for breakdown of marriage – Whether circumstantial evidence could be relied on to prove adultery – Proof of third party's text messages to petitioner wife regarding sexual relationship between her and respondent husband – Whether petitioner wife proved on balance of probabilities respondent husband committed adultery with third party – Whether led to breakdown of marriage – Whether third party ought to pay damages to petitioner wife*

This was a petition for divorce by the petitioner wife ('PW') against her respondent husband ('RH'). She named Cassandra D' Silva Louis as the co-respondent ('Co-R'). PW and RH were married in 2004 and their marriage

was registered under the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). There were two children of the marriage, H and Y. PW pleaded that the cause of the breakdown of her marriage to RH was RH's adultery with the Co-R. It was PW's case that she and RH had a happy marriage until RH started behaving coldly towards her. On 25 October 2014, RH admitted to her that the Co-R was his girlfriend. They had an argument about it, during which RH slapped her twice. PW further claimed that (i) on 14 November 2014, at their matrimonial home, RH had hit her using shoes, a rotan, a broom and had kicked her in the stomach when PW refused to not tell anyone about his relationship with the Co-R ('first police report'); (ii) on 14 January 2015, RH had threatened and forced her to agree to a polygamous marriage and when she refused, RH hit, slapped and pushed her causing her to hit the wall and to fall to the floor; (iii) RH had caused her financial and emotional pressure as RH had been using a BMW car that was registered in her name and because she refused to agree to polygamy, RH did not pay the hire-purchase instalments for the car and refused to return the car to PW; (iv) RH returned the BMW car in a damaged condition; (v) on 17 April 2015, when PW came home from work, she found that the Bangi House had been ransacked and her jewellery missing. According to PW, RH told her he had pawned all her jewellery at a pawn store and he had used the money for the living expenses for PW and the children; (vi) RH had stopped providing any maintenance for her and the children; (vii) Co-R's brother had alleged that PW had threatened to murder the Co-R by hiring gangsters to break the glass in Co-R's shop, which PW denied and filed a police report denying those allegations. The above was captured in seven police reports. In the petition, PW pleaded that due to RH and the Co-R's conduct, she was in a state of despair and had asked RH to end his relationship with the Co-R. However, RH refused and chose to leave PW and continue his relationship with Co-R. PW pleaded that Co-R often sent her text messages with filthy language and had exhibited screenshots of the messages during the trial. PW sought the following reliefs in her petition for divorce, *inter alia*, (i) dissolution of the marriage between her and RH; (ii) the *decree nisi* made absolute immediately; (iii) custody, care and control of both children of the marriage be granted to PW and RH be given access to the children every Sunday from 10am to 5pm; (iv) RH to pay PW child maintenance in the sum of RM8,000 per month until the children complete their first degree; (v) RH is to bear the children's medical, dental, paediatric, specialists including psychological costs; (vi) RH is to pay a lump sum of RM200,000 as spousal maintenance to the petitioner; (vii) RH is to pay half of the amount in his EPF account into the petitioner's EPF account; (viii) PW is entitled to receive half of the nett proceeds of sale of the matrimonial property ('Kajang House'); and (ix) the Co-R is to pay PW damages in the sum of RM200,000. RH, however, filed a reply and cross- petition to PW's petition. RH agreed to the dissolution of the marriage and that the *decree nisi* be made absolute immediately, but he denied that he had committed any acts of domestic

violence against PW and the children. RH also claimed that PW had embezzled the household spending money which he had given to PW and denied that he had pawned PW's jewelleries. It was RH's case that the breakdown of the marriage was caused by PW and not him. RH pleaded that the marriage broke down when PW chased him out of the house in April 2015 in front of his children and the neighbours, which caused him emotional trauma. RH also claimed that PW had extra-marital relationships with several of her students and that PW had poisoned the children's mind against him. RH contended that the Kajang House was not a matrimonial asset since it was purchased purely for investment and that the monies in his EPF account were not matrimonial assets. RH agreed that PW be given custody, care and control of the children and agreed to bear all the children's costs. The issues to be tried by this court were: (i) who was the party responsible for the break-up of the marriage; (ii) what was the amount of child maintenance to be ordered taking into account the benefit and interest of the children; (iii) whether RH should be ordered to pay spousal maintenance in one lump sum of RM200,000; (iv) whether the amount in RH's EPF account was a matrimonial asset and should be divided and paid to PW; (v) whether the Kajang House was a matrimonial asset and should be divided between RH and PW; and (vi) whether Co-R had contributed to the break-up of the PW's and RH's marriage by having committed adultery with RH and if yes, whether Co-R should be ordered to pay damages in the sum of RM200,000 to PW.

Held (dissolving marriage; *decree nisi* made absolute):

(1) Both PW and RH pleaded that their marriage had irretrievably broken down and agreed to the dissolution of their marriage. Transcripts of the WhatsApp messages between PW and RH from 26 November 2014 to 30 November 2014 were admitted in evidence during trial, showing that RH was trying to persuade PW to agree to a polygamous marriage but PW disagreed. She said she wants her husband back before 'her' came into their life. RH testified that the marriage broke down when he was asked by PW to leave the Bangi House and that they had lived separately continuously since then. Based on the pleadings, the WhatsApp messages and RH's own testimony, the marriage had irretrievably broken down in April 2015. (paras 32-38)

(2) Pursuant to ss. 101 and 102 of the Evidence Act 1950, the burden of proof was on PW to prove that RH's alleged adultery with the Co-R had caused and/or led to the irretrievable breakdown of her marriage to RH. Similarly, the burden of proof was on RH to prove that the cause of the breakdown of the marriage was because PW had embezzled the household expenses on shopping and holidays and that she had committed adultery with her students. As this petition and cross-petition for divorce was a civil action, the standard of proof of the alleged adultery was on a balance of probabilities. RH did not name any of the

alleged adulterers as co-respondents in his cross-petition nor did he seek this court's leave to be excused from naming the alleged adulterers as co-respondents. By reason of his failure to comply with s. 58 of the LRA, this court could not consider his plea that one of the causes of the marital breakdown was PW's alleged adultery. RH also did not produce any evidence to prove PW's alleged embezzlement of their household funds. As RH had failed to discharge his burden of proof as regards both his allegations against PW, RH had failed to prove that the breakdown of the marriage was caused by PW. (paras 47, 48, 53, 56, 58 & 59)

(3) PW may rely on circumstantial evidence to prove her case that there was adultery between RH and the Co-R prior to the breakdown of the marriage and that it was the adultery that had caused the breakdown of the marriage. The evidence produced in court by PW to prove her case was her oral testimony, the police reports that she had filed against RH, the WhatsApp text messages between her and RH and between her and Co-R, and the photographs posted by Co-R on her Facebook page and that was sent to her by the Co-R. PW's oral testimony that RH had committed domestic violence on her was supported by the contemporaneous police reports that she had filed after the incidences and by the WhatsApp messages between PW and RH. PW supported her oral testimony with, among others, intimate photographs of RH and Co-R posted by Co-R on her Facebook page. There were numerous text messages exchanged between Co-R and PW produced during the trial, where among others, the Co-R informed PW the various places she had sexual intercourse with RH and that he did not want PW. The Co-R even sent a message to PW with a photo of Co-R in a traditional wedding saree with a message 'Eat this and choke. Cry blood bitch'. (paras 63, 64, 66, 82 & 85)

(4) This court's observation of the three witnesses during their testimonies was that PW was a broken woman – a wife who had lost her husband because she would not agree to a polygamous marriage; a woman who although has a PhD was no longer able to find permanent tenure in a university or college because of bilateral lacrimal gland swelling in her eye and a mother who had to bring up and support her two sons alone. RH was an evasive witness and was caught telling untruths. Co-R had given conflicting answers during the course of her testimony as first she had claimed that her relationship with RH started 'at the end of 2016' but this was contradicted by her Facebook posting on 9 May 2016 of intimate photos of her and RH with the caption 'Happy Anniversary Baby! Two beautiful years' with hearts and kisses and emojis. Two years before 9 May 2016 was 9 May 2014. This date tied in with PW's evidence and the WhatsApp messages between PW and RH, where RH was asking PW to accept a polygamous marriage and when asked for

him to choose, that RH would go with 'her'. Although the 'her' was not named in the WhatsApp messages, PW had named Co-R as RH's 'perempuan simpanan' in her first police report. (paras 90-95)

(5) From Co-R's conduct, it could be presumed pursuant to s. 114 of the Evidence Act 1950 that she and RH were more than 'just friends'. During the trial, both RH and Co-R gave their testimonies on the Zoom platform in the same room, using the same computer and the same Zoom link, and the name Sivasankar was on the computer screen when Co-R gave her testimony. Circumstantial evidence is sufficient to prove adultery since it is impossible to obtain direct evidence of adultery. From the evidence, there was disposition between RH and Co-R to have committed adultery and there was opportunity for them to commit it. Accordingly, PW had proven on a balance of probabilities that RH had committed adultery with Co-R and that their adultery had caused and/or led to the breakdown of the marriage between RH and PW. The Co-R must therefore take her share of responsibility for the breakdown of the marriage. Accordingly, Co-R was hereby ordered to pay PW damages in the sum of RM100,000 as damages. (paras 98-106)

(6) Both children of the marriage have been in the custody of their mother since RH left the family home in April 2015. It was in the best interest and welfare of the children that the *status quo* be maintained, and as both PW and RH agree that PW be given custody of the children, custody, care and control of both children be granted to PW and RH to be given access to the children according to certain terms. As for maintenance of spouse and children, RH works with Sarawak Shell Bhd with a monthly salary of RM30,000 while PW works as a lecturer with TAR college on a yearly contract. Having considered the means of the parties and their needs, the degree of the parties' responsibility for the breakdown of the marriage, this court ordered that RH pay the sum of RM2,000 per month in child maintenance for each child and the sum of RM2,000 per month as spousal maintenance to PW until her remarriage. (paras 108-117)

(7) Monies in RH's account with the EPF formed part of the matrimonial assets. Pursuant to s. 53A of the Employees Provident Fund Act 1991, the EPF Board after receiving the sealed order of the court is empowered to transfer the sums ordered by court from RH's account to PW's account in EPF. The Kajang House was purchased by RH during the marriage. It is trite law that properties purchased during a marriage forms part of the matrimonial property regardless of whether it was purchased for occupation or investment. RH had sold the Kajang House in 2017. Under s. 76(1) of the LRA, this court could order the division of the proceeds of sale received by RH for the sale of the Kajang House between PW and RH. Having taken into account the considerations listed in s. 76(2) of the LRA, this court hereby ordered the equality of distribution of the matrimonial assets between RH and PW.

Accordingly, this court made the following orders in respect of PW's petition and RH's cross-petition, *inter alia* (i) the marriage between PW and RH was hereby dissolved, and (ii) the *decree nisi* was made absolute immediately. (paras 120-125)

Case(s) referred to:
Ang Ching Seong v. Chong May Wai & Anor [2014] 1 CLJ 254 HC ***(refd)***
Chua Kok Tee Davis v. DBS Bank Ltd [2015] 5 SLR 231 ***(refd)***
Dr Gurmail Kaur Sadhu Singh v. Dr Teh Seong Peng & Anor [2015] 2 CLJ 42 HC ***(refd)***
Farnham v. Farnham [1925] 133 LT 320 ***(refd)***
GGC v. CCC & Anor [2016] 1 LNS 885 HC ***(refd)***
In re B (Children) [2009] AC 11 ***(refd)***
In re S-B (Children) (Care Proceedings: Standard of Proof) [2009] UKSC 17 ***(refd)***
Koay Cheng Eng v. Linda Herawati Santoso [2008] 4 CLJ 105 CA ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
STU v. The Comptroller Of Income Tax [1962] 1 LNS 179 HC ***(refd)***
Yew Yin Lai v. Teo Meng Hai & Anor [2013] 6 MLJ 787 ***(refd)***

Legislation referred to:
Employees Provident Fund Act 1991, s. 53A
Evidence Act 1950, ss. 59, 60, 101, 102, 114
Law Reform (Marriage and Divorce) Act 1976, ss. 53(2), 54(1), (2), 58(1), (3)(b), 76(1), (2), 77, 78, 93(1), 106

For the petitioner - Ranee Sreedharan; M/s Ranee Sree & Assocs
For the respondent & co-respondent - Jazzmine Khoo Wei Ching, Harvinderjit Singh Daljit Singh & Thanraj Singh Balraj Singh; M/s Jazzmine Khoo & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Faizah Jamaludin J:

Introduction

[1] This is a petition for divorce by the petitioner, Glaret Shirley a/p Sinnappan ("PW") against her husband, Sivasankar a/l Kunchiraman ("RH"). She has named Cassandra D'Silva a/p Louis, as the co-respondent ("Co-R").

[2] PW and RH were married on 28 February 2004 and their marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). There are two children of the marriage – H (born on 14 February 2005) and Y (born on 9 January 2014).

PW's Case

[3] PW pleads that the cause of the breakdown of her marriage to RH is RH's adultery with the Co-R.

[4] PW's case is that she and RH had a happy marriage where they travelled locally and overseas annually for holidays. However, she noticed that RH started behaving coldly towards her and things became bad between them in October 2014. She says that on 25 October 2014, RH admitted to her that the Co-R is his girlfriend. They had an argument about it, during which RH slapped her twice.

[5] PW further claims that on 14 November 2014 at 4am, at their matrimonial home in Bangi, RH had threatened PW not to tell anyone about his relationship with the Co-R. She said she refused, and as result RH hit her using shoes, a rotan and a broom. He also kicked her in the stomach even though she had undergone a caesarean section on 9 January 2014 in delivering their second child. PW says that RH raised a metal frog sculpture weighing around 3kg with the intention of hitting her with it. He also threatened to kill her and both their children – he told her that he was going to submerge their second son, Y, who was then ten months old into a bucket and drown him to death. PW filed a police report no. Kajang/041909/14 relating to the incident on the same day at 18.49pm ("first police report").

[6] PW filed a second police report on 15 January 2015 at 12.05pm ("second police report") to report an incident that she said took place on 14 January 2015 at 11pm, where RH had threatened and forced her to agree to a polygamous marriage. PW pleaded that when she refused to agree to polygamy, RH hit, slapped and pushed her causing her to hit the wall and fall to the floor.

[7] PW pleads that RH had also caused her financial and emotional pressure because of her refusal to agree to polygamy. PW says that RH had been using a BMW car that was registered in her name, for the four years prior to the filing of the petition. PW says that because she refused to agree to polygamy, RH did not pay the hire-purchase instalments for the car for two months and refused to return the car to PW. On 16 April 2015 at 1.41pm, PW filed another police report with regards to RH's refusal to return the BMW car and his refusal to pay the hire-purchase instalments ("third police report"). In the third police report, PW requested the police to assist her to get the car back from RH.

[8] RH returned the BMW car, on 17 April 2015 at 8pm, the day after PW filed the third police report. He returned the car in the compound of the Kajang Police Station. PW pleads that RH had returned the car in a damaged condition. She says that he had pulled out the spoiler of the car damaging the paintwork of the car, replaced the 20-inch rims with damaged rims, tore the carpet, scratched the dashboard with a knife and removed the spare tyre from the car. PW filed a police report on 19 April 2015 at 8pm to report the damage to the car ("fourth police report").

[9] PW filed a fifth police report against RH on 17 April 2015 at 5pm ("fifth police report") to report that when she came home from work, she found that the Bangi House had been ransacked and her digital camera and her jewellery were missing. PW said that when she called RH, he told her that he had pawned all her jewellery at a pawn store in Brickfields and he had used the money for the living expenses for PW and the children. In the fifth police report, PW stated that she did not find that RH's reason made any sense since he was earning a salary of RM30,000 per month.

[10] PW pleads that RH had stopped providing any maintenance for her and the children since April 2015. She says prior to that he had given maintenance in the sum of RM10,000 per month for her and the children. She says that RH had pressured her to agree to polygamy and threatened to stop the maintenance if PW refused to agree to polygamy. She filed a police report to report RH's failure to pay maintenance to her and the children ("sixth police report").

[11] On 17 June 2015, PW filed a police report to deny the allegation made in a police report filed by the Co-R's brother, Jeffrey D'Silva, where he had alleged that PW had threatened to murder the Co-R by hiring gangsters to break the glass in the Co-R's shop ("seventh police report").

[12] PW says that as she was not working full time and after she had pleaded with RH, he directly paid the babysitter's cost, the nursery cost, the cost of the van to the nursery and their eldest son's Grab cost to school since October 2017. RH also paid the tuition fees in the sum of RM1,000 for their eldest son since March 2018.

[13] In the petition, PW pleads that due to RH and the Co-R's conduct, she was in a state of despair and had asked RH to end his relationship with the Co-R. However, RH refused and chose to leave PW and continue his relationship with the Co-R. PW pleads that RH has been co-habiting with the Co-R since 17 April 2015 at an apartment in xx-x-x, Danau Impian Condominium, 58100 Kuala Lumpur or at No. xx Jalan Anggor, Taman Shanghai, 58100, Kuala Lumpur.

[14] PW pleads that the Co-R often sends her text messages with filthy language. PW had exhibited screenshots of the messages during the trial.

[15] PW sought the following reliefs in her petition for divorce:

(i) dissolution of the marriage between her and RH;

(ii) the *decree nisi* made absolute immediately;

(iii) custody, care and control of both children of the marriage be granted to PW;

(iv) RH be given access to the children every Sunday from 10am to 5pm. And that to be responsible for picking up the children and sending them back to PW's house in Bandar Baru Bangi ("Bangi House");

(v) RH is to call before seeing the children and if the RH cannot pick up the children at the designated time, he must inform PW through an SMS a day before;

(vi) RH is allowed to take the children for holidays during the school holidays with PW's permission;

(vii) RH is to pay PW child maintenance in the sum of RM8,000 per month until the children complete their first degree. The child maintenance is to be paid into PW's bank account at Maybank by the first of every month and the latest by the seventh of each month;

(viii) RH's access to the children is dependent on the payment of the child maintenance above;

(ix) RH is to bear the children's medical, dental, paediatric, specialists including psychologists, costs;

(x) RH is to pay the costs of the children's education until they complete their bachelor's degree or a vocational course, depending on their ability;

(xi) RH is to pay a lump sum of RM200,000 as spousal maintenance to the petitioner;

(xii) RH is to pay half of the amount in his EPF account into the petitioner's EPF account;

(xiii) RH is to sell the matrimonial property held under Hakmilik No. H.S.(M) 26xxx No. PT 75xxx Bandar Kajang Daerah Hulu Langat, Negeri Selangor ("the Kajang House") within three months from the date of this filing of this petition;

(xiv) PW is entitled to received half of the nett proceeds of sale of the Kajang House, after redemption of the housing loan, legal fees and all other expenses incurred in relation to the sale of the property;

(xv) the Co-R is to pay PW damages in the sum of RM200,000;

(xvi) RH is to bear the legal costs of this petition on an indemnity basis; and

(xvii) any other orders or reliefs that this court deems fit.

RH's Case

[16] RH filed a reply and cross-petition to PW's petition. In his reply and cross-petition, RH agreed to the dissolution of the marriage and that the *decree nisi* be made absolute immediately.

[17] He denies that he had committed any acts of domestic violence against PW and the children and puts PW to strict proof. RH says that he had slapped PW twice on 25 November 2014 because PW tried to commit suicide by trying to jump from the 13th floor of a building.

[18] RH says that he refused to pay the monthly instalments for the BMW car because he claims that PW had embezzled the household spending money which he had given to PW. He says that the damage to the BMW car was done by PW with the help of her sister, after he had returned the car in the compound of the Kajang Police Station.

[19] RH denies that he had pawned PW's jewelleries. He claims that PW had pawned the jewelleries herself.

[20] It is RH's case that the breakdown of the marriage was caused by PW and not him.

[21] RH pleads that the marriage broke down when the PW chased him out of the house in April 2015 and the photos were uploaded on Facebook. He says PW had chased him out of the house in front of their children and the neighbours, which had embarrassed him and caused him emotional trauma. He also pleads that the marriage had broken down because PW had embezzled funds allocated for family expenses, and that she used the funds for shopping and holidays overseas without informing him. RH also claims that PW had extra-marital relationships with several of her students and that she had been dismissed from her job twice because of it. He says that PW had poisoned the children's mind against him and had threatened to contact his employer in order to destroy his career.

[22] RH contends that the Kajang House is not a matrimonial asset since it was purchased purely for investment. He says that he no longer owns the Kajang House as he had sold it.

[23] RH also contends the monies in his EPF account are not matrimonial assets.

[24] As regards custody, care and control of the children and his access to them, RH agrees that PW be given custody, care and control of the children. He agrees that his access to the children be on every Sunday between 10am to 5pm and that he is responsible for picking them up and sending them back to PW's house in Bandar Baru Bangi. He also agrees to call before seeing the children and that if he is unable to pick them up at the designated time, he will inform PW through an SMS a day before. RH agrees to be allowed to take the children for holidays during the school holidays. But instead of with PW's "permission", RH asks that he be allowed to take the children for holidays during the school holidays with PW's "knowledge".

[25] RH agrees to bear all the children's costs. He agrees to pay for the costs of the children's education until they complete their bachelor's degree or a vocational course, depending on their ability. However, instead of making the payment to the PW, he wants to make the payments directly to the relevant parties.

[26] RH also agrees to bear the children's medical, dental, paediatric costs until they attain the age of 21 years. He does not agree to bear the costs of the children's specialists including psychologists.

[27] RH prayed in his reply and cross-petition that this court make no order as to matrimonial assets. He also prayed that PW is prohibited from disparaging, poisoning and/or inciting the children to hate him.

Agreed Facts

[28] The parties agree to the following facts:

(i) PW's and RH's marriage have irretrievably broken down and that the parties cannot solve the problems between both of them;

(ii) PW and RH have lived separately for a continuous amount of time;

(iii) RH had previously tried to deliver a petition for divorce to the petitioner. But PW refused to accept the petition;

(iv) RH works at Sarawak Shell Berhad. His salary is RM30,000 per month. RH's job requires him to spend most of his time off-shore;

(v) The Co-R had circulated photographs of her and RH on the social media platform Facebook from May 2016 to October 2016.

Issues To Be Tried

[29] The issues to be tried by this court are the following:

(i) Who is the party responsible for the break-up of the marriage?

(ii) What is the amount of child maintenance to be ordered taking into account the benefit and interest of the children?

(iii) Whether RH should be ordered to pay spousal maintenance in one lump sum of RM200,000?

(iv) Whether the amount in RH's Employees Provident Fund ("EPF") account is a matrimonial asset and should be divided and paid to PW?

(v) Whether the Kajang House is a matrimonial asset and should be divided between RH and PW?

(vi) Whether Co-R had contributed to the break-up of the PW's and RH's marriage by having committed adultery with RH? If yes, whether Co-R should be ordered to pay damages in the sum of RM200,000 to PW?

Analysis And Findings Of This Court

[30] PW had filed this petition for divorce under s. 53 of the LRA. And RH had filed a cross-petition for divorce. Both she and RH are non-Muslims. They have been married since 2004. They had referred their matrimonial difficulties to the marriage tribunal and the tribunal through a certificate dated 13 January 2016 had confirmed that it had failed to reconcile PW and

RH's marriage. In the tribunal's certificate issued under s. 106 of the LRA (in bundle B/p. 4), the tribunal stated it was unable to reconcile the marriage because the wife (PW) refused a divorce ("isteri tidak bersetuju untuk bercerai").

[31] In considering a petition for divorce under s. 53 of the LRA, courts have to consider the following factors:

(i) whether the marriage between the petitioner and the respondent has irretrievably broken down;

(ii) who is to have custody, care and control of the children of the marriage;

(iii) the amount of access to the children for the parent without custody;

(iv) the amount of maintenance for the children and the spouse; and

(v) the division of matrimonial assets between PW and RH.

Has The Marriage Between PW And RH Irretrievably Broken Down?

[32] Both PW and RH have pleaded that their marriage had irretrievably broken down and have agreed to the dissolution of their marriage.

[33] In considering PW's petition for divorce and RH's cross-petition for divorce, this court must decide whether the marriage between them have irretrievably broken down, and when did the marriage break down.

[34] Transcripts of the WhatsApp messages between PW and RH from 26 November 2014 to 30 November 2014 were admitted in evidence as Part B documents during the trial. The messages show that in late November 2014, RH was still trying to persuade PW to agree to a polygamous marriage. But PW disagreed – she said that she wants her husband back before "her" came into their life. In the messages, RH was still referring to PW as "ayg", which during cross-examination RH says is short form for "sayang". He also said in one of his messages to PW on 26 November 2014 that she was a "nice gal". If the marriage had broken down, RH would not have referred to PW as "sayang" or a "nice gal".

[35] RH during cross-examination testified that the marriage broke down when he was asked by PW to leave the Bangi House. He said, "I considered it's broken the day I was locked out of from my house'. RH stated in his witness statement that RW had chased him out of the matrimonial house in early April 2015. In his pleadings, RH expressly agreed to PW's pleading that they had lived separately continuously since April 2015.

[36] RH's case that was put by his counsel to PW during her cross-examination, was that the breakdown of the marriage had started in 2013. With respect to learned counsel, RH's position that she had put during the trial was not RH's pleaded case. It is trite law that a litigant is bound by his or her pleadings: see *Samuel Naik Siang Ting v. Public Bank Bhd* [2015]

8 CLJ 944; [2015] 6 MLJ 1; [2018] 3 AMR 259, FC. Accordingly, RH cannot during the trial change his case to claim that the marriage had broken down in 2013 – the year he met the Co-R.

[37] Based on the pleadings, the WhatsApp messages and RH's own testimony, this court finds that the marriage had irretrievably broken down in April 2015.

[38] This court is satisfied that the marriage between PW and RH had irretrievably broken down, and for the reasons discussed above, the marriage had irretrievably broken down in April 2015.

What Was The Cause Of The Breakdown Of The Marriage?

[39] Once it is established that the marriage between the PW and the RH had irretrievably broken down in April 2015, this court must make an inquiry into the facts and circumstances alleged as having caused and/or led to the breakdown of the marriage.

[40] Pursuant to s. 53(2) of the LRA, a court when hearing a petition for divorce on the ground that the marriage had irretrievably broken down is required to inquire into the cause of the breakdown. Section 53(2) of the LRA states:

> 2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

[41] In making the inquiry, this court must have regard to one or more of facts listed in s. 54(1) of the LRA:

> 54. Proof of breakdown
>
> (1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:
>
> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;
>
> (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;
>
> (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
>
> (d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

[42] Pursuant to s. 54(2) of the LRA, a court in considering whether it is just and reasonable to make a decree of divorce must consider all the circumstances, including the conduct of the parties and how the interest of

A the children of the marriage or of either party may be affected by the dissolution of the marriage. Section 54(2) of the LRA states that a court may make a *decree nisi* subject to such terms and conditions as it may think fit to attach:

> (2) In considering whether it would be just and reasonable to make a
B decree the court shall consider all the circumstances, including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a *decree nisi* subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall
C dismiss the petition.

[43] The determination of the degree of fault in the breakdown of marriage is important as it is one of the factors that the court must consider in its assessment of the amount of maintenance payable to a spouse.

D **[44]** The other factor that the court has to take into account in assessing the amount of maintenance payable to a spouse is the means and the needs of the parties. Section 78 of the LRA states:

> 78. Assessment of maintenance
>
> In determining the amount of any maintenance to be paid by a man to
E his wife or former wife or by a woman to her husband or former husband, **the court shall base its assessment primarily on the means and needs of the parties,** regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, but **shall have regard to the degree of responsibility which the court apportions to each party**
F **for the breakdown of the marriage.** (emphasis added)

Was The Breakdown Of The Marriage Caused By RH's Adultery With The Co-R?

[45] PW's case is that the marriage broke down because of RH's adultery with the Co-R. RH's case is that the marriage broke down because PW had
G embezzled the monies that were for household funds on shopping and holidays and because of her alleged adultery with some of her students.

[46] Both RH and the Co-R deny that their alleged adultery was the cause of the breakdown of their marriage.

H **Burden Of Proof**

[47] Pursuant to ss. 101 and 102 of the Evidence Act 1950, the burden of proof is on PW to prove that RH's alleged adultery with the CoR had caused and/or lead to the irretrievable breakdown of her marriage to RH.

I **[48]** Similarly, the burden of proof is on RH to prove that the cause of the breakdown of the marriage was because PW had embezzled the household expenses on shopping and holidays and that she had committed adultery with her students.

Standard Of Proof For Adultery In A Divorce Petition?

[49] What is the standard of proof required in a divorce petition where adultery is alleged? In *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584; [2015] 5 AMR 497 ("*Sinnaiyah v. Damai Setia*"), the Federal Court cited with approval the UK Supreme Court's decision in *In re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17; [2010] 1 AC 678 where it had followed the law as pronounced by the UK House of Lords' in *In re B (Children)* [2009] AC 11, that in civil cases there is only one standard of proof in civil cases even in hybrid cases: that standard of proof is on a balance of probabilities. Richard Malanjum CJ (Sabah & Sarawak) (as he then was) held:

> [39] It is worthy to note that the English Supreme Court in the case of *In re S-B Children* (2009) UKSC 17 followed the law as pronounced in *In re B (Children)* (*supra*). The Supreme Court firmly approved that "there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not". The court also rejected the "*nostrum*, 'the more serious the allegation, the more cogent the evidence needed to prove it'". This rejection goes to show that even for hybrid cases. The same civil standard of proof applies.
>
> [40] The Canadian courts took the same position as the English courts. In *FH v. McDougall* [2008] SCC 53 the Canadian Supreme Court held that "in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinise the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred".

[50] The Federal Court made it clear in *Sinnaiyah v. Damai Setia* that there are only two standards of proof *ie*, (i) beyond reasonable doubt in criminal cases, and (ii) on a balance of probabilities in civil cases. It held that the standard of proof of fraud in a civil case is on a balance of probabilities. It held:

> [49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In re B (Children)* (*supra*). It is this: *that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard.* And "(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts".

[51] A petition for divorce or for judicial separation is a civil action. It is not a criminal action. Therefore, based on the Federal Court's decision in *Sinnaiyah v. Damai Setia*, the standard of proof of adultery in a petition for divorce or judicial separation is proof on a balance of probabilities.

[52] There are many divorces petition cases, prior to the Federal Court's decision in *Sinnaiyah v. Damai Setia*, that held the standard of proof of adultery is beyond reasonable doubt. One of those cases is *Dr Gurmail Kaur Sadhu Singh v. Dr Teh Seong Peng & Anor* [2015] 2 CLJ 42; [2014] 3 AMR 437; [2014] 11 MLJ 843, which was relied on by the Co-R's counsel in this instant case. In *Dr Gurmail Kaur*, the learned High Court Judge held that the standard of proof of adultery is proof beyond reasonable doubt. The High Court's judgment was delivered more than a year before the decision of the Federal Court in *Sinnaiyah v. Damai Setia*. In light of the Federal Court's decision in *Sinnaiyah v. Damai Setia*, the cases (including *Dr Gurmail Kaur*) which held that the standard of proof of adultery in petitions for divorce and judicial separations is beyond reasonable doubt are no longer good law.

[53] Accordingly, as this petition and cross-petition for divorce is a civil action, the standard of proof of the alleged adultery is on a balance of probabilities. PW must prove that the RH and Co-R had committed adultery prior to the breakdown of the marriage and that it was the adultery between them that had caused or lead to the breakdown of the marriage. Similarly, RH must prove that PW's alleged adultery with her student had caused or lead to the breakdown of their marriage.

Has RH Discharged His Burden Of Proof?

[54] RH had alleged adultery on the part of RW in his cross-petition. Pursuant to s. 58 of the LRA, he must make the students that he alleged PW to have had adulterous relationships with co-respondents in his cross-petition, unless excused by this court. Section 58(1) of the LRA states:

> (1) On a petition for divorce in which adultery is alleged, or in the answer of a party to the marriage praying for divorce and alleging adultery, **the party shall make the alleged adulterer or adulteress a co-respondent,** unless excused by the court on special grounds from doing so.
>
> (emphasis added)

[55] In her reply to RH's cross petition, PW strenuously denies that she ever had any extra-marital relationship with her students and puts RH to strict proof. She says that RH made that allegation to besmirch her good name and her image

[56] RH did not name any of the alleged adulterers as co-respondents in his cross-petition nor did he seek this court's leave to be excused from naming the alleged adulterer(s) as co-respondent(s). By reason of his failure to comply with s. 58 of the LRA, this court cannot consider his plea that one of the causes of the marital breakdown was PW's alleged adultery.

[57] In addition, RH did not produce any evidence before this court to prove the alleged adultery by PW. When asked during cross-examination as to whether he had proof, RH replied "of course I don't have proof."

[58] RH also did not produce any evidence to prove PW's alleged embezzlement of their household funds.

[59] As RH had failed to discharge his burden of proof as regards both his allegations against PW, this court finds that RH had failed to prove that the breakdown of the marriage was caused by PW.

Has PW Discharged Her Burden Of Proof?

[60] Lee Swee Seng J (as he then was) in *GGC v. CCC & Anor* [2016] 1 LNS 885 held that it is unreasonable to expect direct evidence of adultery and that adultery is expected to be established by circumstantial evidence. He said that it would be impossible to lay down what circumstances that would be sufficient to establish adultery. His Lordship held:

> [85] … *It would be unreasonable to expect direct evidence of adultery* unless of course a child is born and DNA test revealed the child's parentage. *Normally the matrimonial offence of adultery is expected to be established by circumstantial evidence, but in that event the circumstances must be such as to lead to the necessary conclusion that adultery was committed by the spouse concerned.* On the other hand it would not be possible to lay down what circumstances would be sufficient to establish adultery, because circumstances may be diversified by the situation and character of the parties, by the state of general manners and by many other incidental circumstances, apparently slight and delicate in themselves, but they may have important bearing on the particular case. See the case of *Yew Yin Lai v. Teo Meng Hai & Anor* [2013] 8 MLJ 787 where it was observed as follows:
>
> > [67] In the present case there is no other explanation for the conduct of the respondent other than that there was indeed an affair. In this case the respondent and co-respondent had all the opportunity. The respondent had once before admitted to the petitioner, that he did have extra marital affair. He was forgiven by the petitioner. The inference of adultery arises when there is proof of the disposition of parties to commit adultery, together with the opportunity to commit it. (emphasis added)

[61] The highlighted phrase from the judgment in *Yew Yin Lai v. Teo Meng Hai & Anor* [2013] 8 MLJ 787 is Lord Merrivale P's *dicta* in *Farnham v. Farnham* [1925] 133 LT 320, where he held:

> The inference of adultery arises when there is proof of the disposition of the parties to commit adultery, together with the opportunity to commit it.

[62] In the case of *Ang Ching Seong v. Chong May Wai & Anor* [2014] 1 CLJ 254, the High Court held that the court may consider other acts instead of direct evidence of sexual intercourse to conclude that there is an adulterous relationship between the respondent and co-respondent.

[63] From these case laws, it is clear that PW may rely on circumstantial evidence to prove her case that there was adultery between RH and the

Co-R prior to the breakdown of the marriage and that it was the adultery that had caused the breakdown of the marriage. In the Singapore case of *Chua Kok Tee Davis v. DBS Bank Ltd* [2015] 5 SLR 231, Vinodh Coomaraswamy J held:

> Circumstantial evidence is not inevitably inferior to direct evidence. It can be every bit as probative as direct evidence if the circumstances or the inferential chain are obvious and compelling.

[64] The evidence produced in court by PW to prove her case is her oral testimony, the police reports that she had filed against RH, the WhatsApp text messages between her and RH and between her and the Co-R, and the photographs posted by the Co-R on her Facebook page and that was sent to her by the Co-R. She also produced a photo of an alleged Hindu traditional wedding between RH and the Co-R, which PW says was given to her by the Co-R's father.

[65] Under s. 59 of the Evidence Act 1950, all facts may be proved by direct oral evidence. The law is settled that under s. 60 of the Evidence Act 1950, direct oral evidence is sufficient to prove a fact in the absence of documentary evidence to support it: see *STU v. The Comptroller Of Income Tax* [1962] 1 LNS 179; [1962] 1 MLJ 220.

[66] Although it is not necessary in civil cases for evidence to be corroborated, PW's oral testimony that RH had committed domestic violence on her is supported by the contemporaneous police reports that she had filed after the incidences and by the WhatsApp messages between PW and RH reproduced above. Additionally, her oral testimony as regards RH request that she agree to a polygamous marriage is supported by contemporaneous WhatsApp messages between her and RH.

[67] PW testified that she noticed RH's behaviour towards her, and the marriage started changing around October 2014 (*ie*, after 10½ years of marriage). She said that RH started behaving coldly towards her and in October 2014, whilst they were on holiday in Cameron Highlands, a day after Deepavali, RH admitted that the Co-R was his girlfriend. They had a fight, during which RH slapped her twice.

[68] RH does not deny that he had slapped PW twice during the argument in November 2014 but pleaded that he had slapped her because he wanted to stop her from committing suicide by jumping from the 13th floor of the building that they were in. PW denied RH's claim. When asked by her counsel during examination in chief, PW said that they were on the second floor of a four-storey apartment building, and she did not intend to commit suicide by jumping of the building.

[69] RH changed his testimony after being told by PW's counsel during cross-examination that the building was four-storeys only and there was no 13th floor. He said instead "… But the point is I did that action because I just want her from jumping out, whether it's a high rise or lower one, my action was because I want to stop her."

[70] PW was asked during the trial how she felt when RH told her that the Co-R was his girlfriend. Her answer is reproduced below:

PW's Counsel: … when you heard the Respondent was having the Co-Respondent as a girlfriend, how did you feel?

PW: I was very upset. I asked him, whose messages is this because I found out that there were messages in his handphone saying that 'I miss you baby and I love you so much'. I asked him whose message is this, who is this person, and he told me that this is his girlfriend, and he wants me to know about it.

PW's Counsel: Did you, according to the Respondent he says he slapped you because you tried to commit suicide from the 13th floor of the building.

PW: That's not true. It was just a second-floor apartment and I did not do any act like that.

PW's Counsel: Did you want to commit suicide?

PW: No.

[71] After an incident of domestic violence by RH on PW on 14 November 2014, where RH had asked PW not to tell anyone about his adulterous relationship with the Co-R and proceeded to hit her with shoes, a rotan and a broom after she refused, PW filed the first police report on the same day. In the police report, she named Co-R as RH's "perempuan simpanan" (mistress). An excerpt of her first police report is reproduced below:

> Saya Dr Glaret Shirley Sinnappan (…) ingin membuat laporan polis ke atas suami saya bernama Sivasankar a/l Kunchiraman (…). Suami saya menyimpan perempuan simpanan bernama Cassandra beralamat di Brickfields. Suami saya telah mengugut saya agar tidak memberitahu sesiapa akan perbuatannya. Saya tidak setuju dengan perbuatannya lalu dia memukul saya, menyepak saya dan tendang saya diperut tempat saya pernah dibedah untuk melahirkan anak pada 9/1/2014. Dia juga mengugut akan membunuh saya dan anak-anak. Dia berkata dia akan masukkan anak saya Y (9 bulan) ke dalam baldi dan tekannya sampai mati. Dia sering memukul saya dari hari saya mengetahui hubungan sulitnya dengan perempuan tersebut. …

[72] RH denied that he had ever committed domestic violence on PW. He pleads the fact that the police did not take any action against him after the PW's police reports shows that all of PW's statements are untrue.

[73] In reply, PW said that she had told the police not to take any action against RH as she wanted to save the marriage. Her action is consistent with the finding made by the marriage tribunal (as stated in their certificate dated 13 January 2016) that PW did not want a divorce from RH.

[74] During trial, RH tried to make out a case that was different from his pleaded case. RH's case that was put by his counsel to PW during cross-examination, was that the woman that he was having an affair with during the domestic violence incident on 14 November 2014, was not the Co-R but another woman.

[75] As stated above, it is a fundamental principle of law that a litigant in a civil action is bound by his pleadings. RH did not plead that the extramarital affair that he was having during the November 2014 incident was with another woman and not the Co-R. Therefore, he cannot during the trial put a new case that the affair he was having in November 2014 was with another woman and not the Co-R.

[76] RH had testified during cross-examination that he met the Co-R in 2013. Also, under cross-examination, the Co-R admitted that she had met RH "in late 2013 or early 2014". She said that she knew he was married at the time she met him. She corrected counsel by saying that when she met RH, he had only one child and not two children. She told counsel that RH had the second child later. Since the PW and RH's second child was born at the beginning of January 2014 (on 9 January 2014), the Co-R's statement that she met RH in early 2014 is clearly untrue – RH already had his second son by early January 2014.

[77] Accordingly, this court finds that the fact that when the Co-R met RH when he had one child and the fact that RH testified that he met the Co-R in 2013, it can be taken that the Co-R had met RH in 2013.

[78] PW's case was that she was subjected to further violence from RH because she did not agree to a polygamous marriage. She had filed the second police report on 15 January 2015 to report an incident of domestic violence by RH the day before.

[79] The WhatsApp messages show that in November 2014, RH was trying to persuade PW to accept a polygamous marriage. And when she refused, RH said that he will go with "her" because she would never ask him to leave PW.

[80] Although the "her" was not named in the WhatsApp messages, it is consistent with PW's testimony which is supported by her contemporaneous police reports that RH had been trying to persuade her to agree to a polygamous marriage between him, her and the Co-R. PW had named the Co-R in her first police report as RH's "perempuan simpanan" on the same day as the incident. Additionally, as mentioned above, RH had never pleaded that the woman that he was having an affair during that period was another woman, and not the Co-R. It was during the trial that he tried to change his case that the woman he was having an affair with prior to leaving the matrimonial home was another woman and not the Co-R.

[81] The Co-R says that she is not the cause of the breakdown of the marriage between PW and RH. In her reply to PW's petition, the Co-R denied that she had committed adultery with RH. But under cross-examination Co-R said that she started her extra-marital relationship with RH after he had left the matrimonial home in April 2015 and that "it got stronger in year 2016". Her counsel submits, in para. 4 of her written submission in reply, that the marriage "had irrelatively (*sic*) broken down when the Respondent was locked out and/or kicked out of the matrimonial home in April 2015."

[82] PW supports her oral testimony with, among others, intimate photographs posted of RH and the Co-R posted by the Co-R on her Facebook page. The Co-R posted intimate photos of her and the RH on 9 May 2016, with the caption underneath the photos "Happy Anniversary Baby! Two beautiful years" followed by hearts and kisses emojis. RH agreed that the photos posted on the Co-R's Facebook page were that of him and her. And the Co-R agreed that the photographs were that of her and RH together on different occasions and that they were intimate photographs of her with RH. More photos of RH and the Co-R uploaded on her Facebook page are exhibited in bundle B/pp. 170 to 182.

[83] The Co-R denies the caption "Happy Anniversary Baby! Two beautiful years" on her Facebook post of these intimate photographs shows that she had started her intimate relationship with RH two years prior to the posting – on 9 May 2014, *ie*, before he left the matrimonial home on 15 April 2015.

[84] PW's case is that she knew at the end of 2014 that RH was seeing the Co-R and that she had begged the Co-R not to disturb her family. The Co-R admitted during the trial that she had received numerous text messages from the PW stating, "please don't disturb our family".

[85] There were numerous text messages exchanged between the Co-R and PW produced during the trial, where among others the Co-R informed PW the various places she has had sexual intercourse with RH and that he does not want PW. Also, that RH wants a divorce, and that PW has no shame in holding on to him. On 24 August 2018, the Co-R sent a message to PW with a photo of the Co-R in a traditional wedding saree, with a message "LOL photoshoot or real for u to find out …" (in bundle B/pp. 204 to 205). Under the photo of her in the wedding saree that she had sent to PW, the Co-R wrote "Eat this;)) and choke. Cry blood bitch))).

[86] In bundle B/p. 206, there is a photo of what appears to be the Co-R and RH in a traditional wedding ceremony with a priest in a temple. PW said that the Co-R's father, Louis, gave her the photo. However, he was not called as a witness. The Co-R denies that it is her in the photograph. She claims that the photo of her in the wedding saree that she had sent to PW was for a photoshoot and not for a real wedding between her and RH.

[87] This court is not able make a final determination as to whether RH and the Co-R had indeed undergone a traditional Hindu wedding in May 2018 as there were no independent witnesses of fact on the matter and because the Co-R's father was not called as a witness to confirm that he had given the photograph of the "wedding" to PW.

[88] The Co-R's case is that PW cannot rely on the text messages between her and PW or the intimate photos between her and RH to establish an adulterous relationship between her and RH prior to the breakdown of the marriage. The Co-R says that she had sent the text messages to reply to the messages that PW had sent her and to irritate PW. She also said that she had sent PW the photograph of her in the traditional wedding saree was to irritate PW.

[89] Part of the trial of this petition took place during the Government's Movement Control Order ("MCO"). PW had given her testimony in open court prior to the MCO. But both RH's and the Co-R's testimonies were heard *via* the online application Zoom. The benefit of a trial by Zoom, is that a witness' facial expressions are more pronounced and visible to a judge on screen than in a physical trial, where there is a distance between the judge and witness who is in the witness box.

[90] My observation of the three witnesses during their testimonies was that PW was a broken woman – a wife who had lost her husband because she would not agree to a polygamous marriage; a woman who although has a Ph.D is no longer able to find permanent tenure in a university or college because of bilateral lacrimal gland swelling in her eyes (see medical reports dated 14 October 2016 and 3 December 2019); and a mother who has to bring up and support her two sons alone.

[91] I found RH to be an evasive witness. He was caught telling untruths as regards the reason why he had slapped PW in November 2014 in Cameron Highlands. He also tried changing his pleaded case by putting his case that the marriage had broken-down in 2013 – the year he said he met the Co-R; and by claiming that the woman he was having affair with 2014 was not the Co-R but another woman. He also made allegations in his cross-petition that PW had embezzled the household monies for shopping and holidays. The word he had used in his cross-petition is "menyeleweng wang", which like its English translation of "embezzled" are very strong words. A less emotive word would be "menggunakan" (used) or "mengambil" (taken). Nonetheless, RH did not make any attempt to provide any evidence to this court to support his very serious allegation of embezzlement against PW.

[92] RH also did not provide any evidence to support his claim that the marriage broke-down because of PW's alleged adultery with her student or students. As mentioned above, he did not name any of the students as co-respondents in his cross-petition against PW even though it is required under s. 58 of the LRA. The law firm representing him in this case is Messrs.

Rusmah Arunan & Associates, one of the few firms in Malaysia specialising in family law. With such experienced and specialised family lawyers representing him, it is highly unlikely that his lawyers did not know of the requirement in s. 58 of the LRA. It is also highly unlikely that they would not have advised RH to include the names of the students, that he alleged PW to have committed adultery with, as co-respondents in his cross-petition if indeed there was any basis to his allegation of adultery against PW.

[93] The Co-R told PW's counsel during cross-examination that she was aware that he was married but after he left the matrimonial home he had gone to the tribunal and proceeded to apply for a divorce. During re-examination the Co-R told her counsel that she and RH "met earlier but we only started having a relationship way after he was kicked out from the house, somewhere in I think end of 2016." But later, in contradiction to her earlier testimony, the Co-R told her counsel that her relationship started with RH "towards the end of 2015." The Co-R explained "relationship as in we are courting each other but we are totally aware that the divorce case is not settled."

[94] The Co-R also told this court that the intimate photos of her and RH that she had posted on Facebook cannot be used as evidence of adultery between them because they were taken in public places. However, I note that some of the photographs (bundle B/pp. 168 to 181) are "selfies" of her and RH in the back seat of a car and on an aeroplane.

[95] The Co-R had given conflicting answers during the course of her testimony. First, she claimed that her relationship with RH started "at the end of 2016". Then she said their relationship started "towards the end of 2015". This evidence is further contradicted by her Facebook posting on 9 May 2016 of intimate photos of her and RH with the caption "Happy Anniversary Baby! Two beautiful years" with hearts and kisses emojis. Two years before 9 May 2016 is 9 May 2014. This date ties in with the PW's evidence and the WhatsApp messages between PW and RH, where RH was asking PW to accept a polygamous marriage and where after PW said that she would not accept a polygamous marriage and gave him the ultimatum of choosing between "her or me", RH said that he would go with "her" because "she" would never ask him to leave PW. Although the "her" was not named in the WhatsApp messages between PW and RH from 26 November 2014 to 29 November 2014, PW had named the Co-R as RH's "perempuan simpanan" in her first police report filed approximately two weeks before the WhatsApp messages, on 14 November 2014.

[96] Section 114 of the Evidence Act 1950 allows this court to presume "the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

[97] The Co-R had told this court that she is not sleeping with RH. But from her demeanour and her conduct, I find her testimony to be less than truthful. In the common course of human conduct, if the Co-R was only friends with RH, would it be likely that she would send messages to his wife, PW, describing her sexual exploits with RH? And would it be likely that she would be co-habiting with RH after he had left his matrimonial home. Also, if she was just friends with RH, would it be likely that the Co-R would send PW, a photo of herself in a wedding saree and asking PW to "choke on it and cry"? Also, would Co-R continue to taunt PW and "irritate" PW in 2018, three years after RH had left the matrimonial home. Would she be taking intimate photos of her with him and uploading such photos with him on her Facebook with the caption "Happy Anniversary Baby! Two beautiful years" with hearts and kisses emojis?

[98] Having regard to the common course of nature events, human conduct, I find that from the Co-R's conduct, it can be presumed pursuant to s. 114 of the Evidence Act 1950 that she and RH are more than "just friends". During the trial, I noted that both RH and Co-R gave their testimonies on the Zoom platform in the same room, using the same computer and the same Zoom link, and the name "Sivasankar" was on the computer screen when the Co-R gave her testimony.

[99] As discussed earlier, the courts in Malaysia and in England have held that circumstantial evidence is sufficient to prove adultery since it is impossible to obtain direct evidence of adultery. The test that has been applied in our courts time and again to infer adultery, is that promulgated by the English courts in *Farnham v. Farnham* (*supra*), namely, "The inference of adultery arises when there is proof of the disposition of the parties to commit adultery, together with the opportunity to commit it." From the evidence before me, I find that there was disposition between RH and Co-R to have committed adultery and there was opportunity for them to commit it.

[100] Accordingly, I find that PW has proven on a balance of probabilities that the woman that RH wanted her to accept a polygamous marriage prior to the breakdown of their marriage, was the Co-R. I also find that based on the photographs and the caption posted by the Co-R on her Facebook post of 9 June 2016 that on a balance of probabilities the Co-R's intimate relationship with the RH started on or about 9 May 2014, and not at the end of 2016 or towards the end of 2015 as the Co-R had told this court.

[101] For these reasons, I find that PW has proven on a balance of probabilities that RH had committed adultery with the Co-R and that their adultery had caused and/or led to the breakdown of the marriage between RH and the Co-R.

Damages For Adultery

[102] Learned counsel for the Co-R submits PW cannot claim for damages she suffered of the adultery between the Co-R and RH because PW did not plead the loss that she had suffered.

[103] With respect to learned counsel for the Co-R, the court's power to award damages against a co-respondent for adultery is derived from s. 58 of the LRA. A petitioner is not required to quantify and plead the loss that he or she had suffered because of his or her spouse's adultery with a co-respondent.

[104] Section 58 of the LRA states that where a court is satisfied that adultery has been proven, the court is empowered to award damages against the co-respondent "as it thinks fit". Section 58(3)(b) of the LRA reads as follows:

> 58. Damages for adultery may be claimed against co-respondent
>
> (3) Where damages have been claimed against a co-respondent:
>
> (b) if, at the conclusion of the hearing, the court is satisfied that adultery between the respondent and co-respondent has been proved, the court may award the petitioner such damages as it may think fit, but so that the award shall not include any exemplary or punitive element.

[105] This court has found that adultery between RH and the Co-R to have been proven on a balance of probabilities, and that RH's adulterous relationship with the Co-R had caused and/or lead to the breakdown of RH and PW's marriage. The Co-R must therefore take her share of responsibility for the breakdown of the marriage.

[106] Accordingly, based on the facts and the circumstances of the case, this court "thinks it fit" that damages of RM100,000 is the amount that should be awarded to PW. The Co-R is hereby ordered to pay PW damages in the sum of RM100,000 as damages.

Custody, Care And Control Of The Children

[107] In deciding whether to place the child of a marriage in the custody of his father or mother, this court must consider what is in the best interest of the child. In this instant case, both children of the marriage have been in the custody of their mother since RH left the family home in April 2015.

[108] It is in the best interest and welfare of the children that the *status quo* be maintained, and as both PW and RH agree that PW be given custody of the children, this court hereby orders that custody, care and control of both children be granted to PW.

RH's Access To The Children

[109] Having granted the custody of the children to PW, this court hereby orders that RH be given access to the children the following terms:

(i) RH granted access to the children every Sunday from 10am to 5pm;

(ii) on the days that RH has access to the children, the respondent shall pick up the children and send them back to the petitioner's house at No. xx, Jalan x/xxx, Seksyen 8, 43650 Bandar Baru Bangi, Selangor Darul Ehsanx

(iii) RH shall call or message PW, through an SMS or a message *via* the WhatsApp application, before seeing the children. If RH cannot pick up the children at the designated date and time, RH must inform PW through an SMS or a message *via* the WhatsApp application, a day before the designated date; and

(iv) the respondent may take the children for holidays during the school holidays with the petitioner's agreement.

Maintenance Of Spouse And Children

[110] A court may order a man to pay maintenance to his wife or former wife, among others during, the course of matrimonial proceedings, or when granting the decree of divorce: s. 77 of the LRA.

[111] Maintenance to be paid by a man to his wife or former wife is assessed primarily on the "means and needs" of the parties. It will also have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage: s. 78 of the LRA.

[112] As for children, this court is empowered to order a man to pay maintenance for the benefit of his child, (i) if he has refused or neglected to provide for the child; (ii) he has deserted his wife and child is in her charge; (iii) during the pendency of any matrimonial proceedings; or (iv) when making or subsequent to the making of an order placing the child in the custody of any other person: s. 93(1) of the LRA.

[113] PW has asked for RH to pay her a lump sum of RM200,000 as spousal maintenance. And the sum of RM8,000 per month as child maintenance until the children complete their first degree.

[114] Prior to leaving the matrimonial home, RH had given PW RM10,000 per month towards the children's expenses and extra tuition classes and co-curricular activities. However, after RH had left home, he stopped giving the RM10,000. He says that he gives PW the sum of RM1,600. and pays the babysitter RM850 monthly. RH says that whenever he sees the children he gives them cash, food and clothes.

[115] RH works with Sarawak Shell Bhd with a monthly salary of RM30,000. He had provided this court with his Maybank savings account statement from 1 April 2018 to 30 March 2019. The Maybank statement dated 31 March 2019 shows that, in addition to his monthly salary, the sum of RM75,688.85 was credited into his account by Sarawak Shell Bhd. on

19 February 2019. The bank statements show that the monthly payments to PW were RM1,000 referenced Harie's tuition and RM450 for Harie's transport paid directly to the driver, Amir Khaled bin Nga. The statements show sporadic payments to PW relating to "tuition", "milk & driver". The bank statements also show that he makes regular monthly payments to the Co-R of RM500 referenced "normal", and RM1,200 referenced "kootoo n maid".

[116] PW works as a lecturer with TAR College on a yearly contract, which she says is subject to annual renewal because of her medical condition.

[117] Having considered the means of the parties and also their needs, the degree of the parties' responsibility for the breakdown of the marriage, the fact that PW works as a lecturer and has the means of earning her own income, and the fact that RH has agreed to bear all the costs of the children's education until they complete their first degree and their medical and dental costs, this court hereby orders RH to pay the sum of RM2,000 per month in child maintenance for each child; and the sum of RM2,000 per month as spousal maintenance to PW until her remarriage.

Division Of Matrimonial Property

[118] The High Court has the power, when granting and pronouncing a decree of divorce to order the division between the parties any assets acquired by them during the marriage. The court may also order the sale of the matrimonial assets and division of the proceeds of sale between the parties.

[119] Under s. 76 of the LRA, as amended by the Law Reform (Marriage and Divorce) (Amendment) Act 2017, in deciding the division of matrimonial assets, a court shall, subject to the considerations listed in s. 76(2) of the LRA, shall incline towards the equality of division of the matrimonial assets between the parties to the marriage. The considerations are:

(i) each party's contribution in money, property or work towards the acquiring of assets or payment of expenses for the benefit of the family;

(ii) the extent of the contributions made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;

(iii) any debts owing by either party which were contracted for their joint benefit; and

(iv) the needs of minor children of the marriage.

[120] It is settled law that monies in RH's account with the Employees Provident Fund ("EPF") form part of matrimonial assets: see *Koay Cheng Eng v. Linda Herawati Santoso* [2008] 4 CLJ 105; [2008] 4 AMR 159, CA.

Pursuant to s. 53A of the Employees Provident Fund Act 1991, the EPF Board after receiving the sealed order of the court is empowered to transfer the sums ordered by court to from RH's account to PW's account in EPF.

[121] The Kajang House was purchased by RH during the marriage. It is trite law that properties purchased during a marriage forms part of the matrimonial property regardless of whether it was purchased for occupation or investment. Accordingly, I am unable to accept RH's argument that the Kajang House is not a matrimonial asset because it was purchased for investment.

[122] RH had sold the Kajang House in 2017. Under s. 76(1) of the LRA, this court can order the division of the proceeds of sale received by RH for the sale of the Kajang House between PW and RH.

[123] Having taken into account the considerations listed in s. 76(2) of the LRA, and the requirement that subject to those consideration this court should incline towards equality of distribution, this court hereby orders the equality of distribution of the matrimonial assets between RH and PW.

[124] Accordingly, as regards the division of matrimonial properties between the parties, it is hereby ordered that:

(i) RH pays PW the sum of RM106,632.75 being fifty percent (50%) of the net proceeds of the sale that he had received for the Kajang House; and

(ii) RH transfers the sum of RM500,017, being fifty percent (50%) of the sum standing in the credit the respondent's EPF account as at 16 February 2021, into the petitioner's account in EPF.

Decision

[125] Accordingly, for the above reasons, this court makes the following orders in respect of PW's petition and RH's cross-petition:

(i) The marriage between PW, Glaret Shirley a/p Sinnappan, and RH, Sivasankar a/l Kunchiraman is hereby dissolved.

(ii) The *decree nisi* is made absolute immediately.

(iii) PW is granted sole custody, care and control of the children of the marriage, H and Y.

(iv) RH is granted access to the children every Sunday from 10am to 5pm;

(a) On the days that RH has access to the children, RH shall pick up the children and send them back to PW's house at No. XX, Jalan X/xx, Seksyen X, 43650 Bandar Baru Bangi, Selangor Darul Ehsan;

(b) RH shall call or message PW, through an SMS or a message *via* the WhatsApp application, before seeing the children. If RH cannot pick up the children at the designated date and time, RH must inform PW through an SMS or a message *via* the WhatsApp application, a day before the designated date; and

(c) RH may take the children for holidays during the school holidays with PW's agreement.

(v) RH shall pay child maintenance in the sum of RM2,000 per month for each child until each child completes his first degree, or vocational course, depending on his ability.

(vi) RH shall pay PW spousal maintenance in the sum of RM2,000 per month until her remarriage.

(vii) RH shall pay the child maintenance and the spousal maintenance by banking in the sum of RM6,000 per month into the PW's account no. xxxxxxxxxx5 at Maybank on or before the seventh day of each month.

(viii) RH shall pay for all the children's medical and dental costs until they reach 21 years of age.

(ix) RH shall bear the costs of the children's education until they complete their first degree or a vocational course, depending on their ability.

(x) RH shall pay to the PW the sum of RM106,632.75 being 50% of the nett proceeds of sale of the the house previously held under Hakmilik No. H.S.(M) 26638 No. PT 75090 Bandar Kajang Daerah Hulu Langat, Negeri Selangor, with the postal address of No. X Jalan Kantan Permata X, Taman Kantan Permata, 43000 Kajang ("the Kajang House") within 14 days from the date of this order.

(xi) RH shall transfer and/or cause the Board of EPF to transfer the sum of RM500,017, being 50% of the sum standing in the credit the RH's account in EPF as at 16 February 2021, into PW's account in EPF within 14 days from 3 January 2022.

(xii) The Co-R shall pay PW the sum of RM100,000 as damages for her adultery with RH within 14 days from 3 January 2022.

(xiii) PW is granted leave to levy execution or to take all other measures legally available to her to recover the payments ordered against the RH and the Co-R.

(xiv) RH is ordered to pay PW costs of these proceedings in the sum of RM50,000.

(xv) Interest at the rate of 5% per annum on the payments ordered herein from the date of judgment until the date of full settlement of the payments.